No. 87-556

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM LEIGHTON,

Objector-Petitioner,

vs.

UNIROYAL, INC., ROSS BARZELAY, DAVID BERETTA, NORBORNE BERKELEY, JR., E. PAUL CASEY, FREDERICK COLOMBO, E. RAYMOND COREY, JOSEPH P. FLANNERY, ALLEN J. KROWE, HORACE G. MCDONNELL, JR., BURNELL R. ROBERTS, HOWARD B. WENTZ, JR. AND W. THOMAS YORK

Defendants-Respondents,

and

BERNARD POGOSTIN,

Plaintiff-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF THE STATE OF NEW JERSEY

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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LIST OF PARTIES

Petitioner William Leighton was the sole objector to the proposed settlement of this shareholder's derivative action challenging the merger of Uniroyal, Inc. ("Uniroyal") and CDU Acquisition, Inc. Petitioner became a shareholder of record of Uniroyal on November 18, 1985, only three days prior to the hearing on the proposed settlement.

Respondent Uniroyal was the defendant below.* Uniroyal filed a certificate of dissolution on December 2, 1986, and distributed its assets and liabilities to CDU Holding, Inc. ("CDU Holding"), a non-party to these proceedings.

Respondents Ross Barzelay, David Beretta, Norborne Berkeley, Jr., E. Paul Casey, Frederick Colombo, E. Raymond Corey, Joseph P. Flannery, Allen J. Krowe, Horace G. McDonnell, Jr., Burnell R. Roberts, Howard B. Wentz, Jr. and W. Thomas York (the "Directors") were also defendants below. Each of them was a director of Uniroyal at the time of the transactions underlying the complaint.

Respondent Bernard Pogostin was the plaintiff below and a holder of Uniroyal's First Preferred stock at the time of the transactions that formed the basis for his derivative action.

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*In accordance with this Court's Rule 28.1, a statement of corporate affiliations of Uniroyal, Inc. has been included in the Appendix hereto at Ra2-3.

TABLE OF CONTENTS

	Page
List of Parties	i
Table of Authorities	iii
Statement of the Case	1
Reasons for Denying the Writ	4
1. Petitioner's Supremacy Clause Claim Is Not Raised By The Record	4
2. The Supremacy Clause Is Not Properly Invoked Here Because No Conflict Exists Between State And Federal Law	5
3. The Equal Protection Claim Is Improper Because It Was Not Raised In The Highest Court Below	6
4. The Record Does Not Support The Equal Protection Claim	7
Conclusion	8
Appendix	Ra1

TABLE OF AUTHORITIES

Cases	Page
Cardinale v. Louisiana, 394 U.S. 437 (1969)	6
Hamm v. City of Rock Hill, 379 U.S. 306 (1964)	5
Herndon v. Georgia, 295 U.S. 441 (1935)	6
John v. Paullin, 231 U.S. 583 (1913)	6
Orzeck v. Englehart, 195 A.2d 375 (Del. 1963)	5
Progress Development Corp. v. Mitchell, 286 F.2d 222 (7th Cir. 1961)	5
United Asset Management Corp., [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) §77,088 (SEC No-Action Letter, Nov. 27, 1981)	5
Statutes and Rules	
United States Constitution, Art. VI, Cl. 2	4, 5
15 *U.S.C.* § 80a-3(a)	4
15 *U.S.C.* § 80a-3(a)(3)	4
15 *U.S.C.* § 80a-7(a)	4
28 *U.S.C.* § 1257(3)	6
Fed. R. Civ. P. 23.1	3, 6
N.J.S.A. 14A:3-6(1)	5
R. 2:12-4	3
R. 4:32-5	5

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STATEMENT OF THE CASE

Respondents Uniroyal and the Directors do not adopt Petitioner's argumentative and inaccurate Statement of the Case. For a general recital of the chronology of events underlying this litigation, they respectfully refer this Court to that portion of the opinion of the Appellate Division of the Superior Court of New Jersey reproduced at pages 20a-32a of Petitioner's Appendix.

The Pogostin Action

On August 1, 1985, Bernard Pogostin filed a complaint seeking a mandatory injunction requiring Uniroyal to redeem its First Preferred stock as part of the proposed merger of Uniroyal and CDU Acquisition, Inc. Mr. Pogostin owned Uniroyal First Preferred stock at that time, having purchased his shares in

November 1978. Respondent's Appendix at 18 (hereafter cited as "Ra "). Following discovery, there were settlement negotiations and the parties eventually reached a settlement under which the terms of the First Preferred were amended. The trial court scheduled a hearing for November 21, 1985 to consider the fairness, reasonableness and adequacy of that settlement.

The Settlement Hearing

Only one First Preferred shareholder, Petitioner herein, filed objections to the settlement.* The objections, dated November 6 and November 7, 1985, attempted to raise many issues, including the purported application of the Investment Company Act of 1940 ("the ICA") to the merger and Mr. Pogostin's standing to sue. *See* Ra7-17. Affidavits and briefs directed to the merits of these objections were filed in support of the settlement. 5a.

The Chancery Court's Decision

On November 21, the trial court heard argument from all parties, including Petitioner. At the conclusion of the hearing, Judge Lester approved the settlement, finding it to be fair and reasonable, comporting with "common sense, business judgment and logic." In addition, he found that "[a]ny questions which were raised by [Petitioner] in his letters of November 6 and 7 ha[d] been more than adequately answered in the papers filed by and the statements made by [counsel for plaintiff] and [counsel for defendants]." 5a.

The Opinion of the Appellate Division

Petitioner appealed to the Appellate Division of the Superior Court of New Jersey from Judge Lester's Final Order approving the settlement. In a well-reasoned opinion, the Appellate Division affirmed Judge Lester's decision and rejected all of Petitioner's arguments. 52a. The Appellate Division's decision focused, however, on the "substantial question as to whether [Petitioner] had the standing to object to the trial court's approval of the settlement and to prosecute this appeal." 36a.

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*At the hearing on November 21, 1985, Petitioner admitted to the court that he had only recently purchased his five shares of Uniroyal First Preferred stock, having become a record shareholder just three days before that hearing. 30a.

Relying upon precedents under Fed. R. Civ. P. 23.1, the Court held that New Jersey's contemporaneous ownership rule governing the issue of standing to bring suit also applied to the question of whether Petitioner had standing to object to the settlement. 37a-38a. The Appellate Division found that resolution of that issue was dependent upon identifying which event constituted the "transaction" of which Leighton was complaining. The Court concluded that Leighton was complaining about the merger agreements, inasmuch as the "primary reason for [his] objections was the expenditure of millions of dollars of corporate funds in support of the merger." 49a-50a. All of the relevant dates surrounding the merger transaction long preceded November 18, 1985, when Leighton became the record holder of First Preferred stock. Thus, the Court found that Leighton lacked standing to challenge the settlement.

In spite of its conclusion with respect to standing, the Appellate Division addressed the merits of Leighton's appeal. It concluded that the trial judge "did not mistakenly exercise his discretion by approving the settlement agreement concerning the merger and restructuring of Uniroyal and that all of the issues of law raised with respect thereto are clearly without merit." 52a.

Petition for Certification to the Supreme Court of New Jersey

On April 30, 1987, Petitioner filed a Petition for Certification with the Supreme Court of New Jersey. Ra4. The only constitutional issue raised in the three questions that Petitioner presented for certification was his claim that the Supremacy Clause had been violated by the lower courts' purported failure to adjudicate the merits of Petitioner's settlement objections predicated upon the ICA. The New Jersey Supreme Court denied the Petition for Certification.*

*Rule 2:12-4 of the Rules Governing the Courts of the State of New Jersey states that "[c]ertification will be granted only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court . . . and in other matters if the interest of justice requires. Certification will not be allowed on final judgments of the Appellate Division except for special reasons."

REASONS FOR DENYING THE WRIT

1. Petitioner's Supremacy Clause Claim Is Not Raised By The Record.

Petitioner asserts that the Appellate Division of the New Jersey Superior Court violated the Supremacy Clause, U.S. Constitution, Art. VI, Cl. 2, when it determined that Petitioner lacked standing to challenge the settlement of a shareholders' derivative lawsuit and thus did not determine the merits of his claim that the underlying transaction had violated the ICA.

In fact, however, the issue of the application of the ICA to the Uniroyal-CDU Holding merger was considered by both the trial court (5a) and the Appellate Division (52a) and found to be meritless. It is therefore beyond dispute that Petitioner had an opportunity to challenge the settlement based upon his claim of a violation under the ICA. His contention to the contrary is false and exceeds even the bounds of zealous advocacy.

Petitioner had objected to the settlement on the grounds that CDU Acquisition, Inc., CDU Holding and Robin Acquisition Corporation were "investment companies" within the meaning of Section 3(a) of the Investment Company Act of 1940, 15 U.S.C. 80a-3(a) (1985), and that their activities violated Section 7(a) of that Act, 15 U.S.C. 80a-7(a) (1985).

Petitioner's claims were entirely without merit. None of the companies meets the definition of an "investment company." In order to be an "investment company," a company must have over forty percent (40%) of the value of its total assets invested in "investment securities." "Investment securities" are defined under the Act in Section 3(a)(3), which states:

> "[I]investment securities" includes all securities *except*: (A) government securities, (B) securities issued by employees' securities companies, and (C) *securities issued by majority-owned subsidiaries of the owner which are not investment companies*. [Emphasis added].

Here, CDU Acquisition, Inc., CDU Holding and Robin Acquisition Corporation were not investment companies because they did not own any "investment securities."

During the relevant period, CDU Holding's only asset was the common stock of its wholly-owned subsidiary, Uniroyal. Because

Uniroyal was a manufacturing and marketing business, not an investment company, Uniroyal stock was not an "investment security" within the meaning of ICA Section 3(a)(3). *See United Asset Management Corp.*, [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) § 77,088 at 77,744 (SEC No-Action Letter, Nov. 27, 1981); *Progress Development Corp. v. Mitchell*, 286 F.2d 222, 232 (7th Cir. 1961).* Thus, Petitioner's argument grounded in the ICA is without merit and was properly rejected as a basis for upsetting the settlement.**

2. **The Supremacy Clause Is Not Properly Invoked Here Because There Is No Conflict Between State And Federal Law With Respect To The Adjudication Of The ICA Issue.**

Even if Petitioner's argument that his ICA claim was not heard is accepted, he has not preserved an issue worthy of this Court's consideration. The Supremacy Clause provides that whenever there is a clear conflict between state and federal law, federal law will prevail. *Hamm v. City of Rock Hill*, 379 U.S. 306, 311-12 (1964). There is no such conflict in this case.

The New Jersey Appellate Division held, as a matter of New Jersey law, that an individual's standing to object to a settlement of a derivative suit should be governed by the same standard that governs an individual's standing to bring a derivative action. It concluded that Petitioner did not meet this test, and it therefore dismissed his appeal for lack of standing. The Appellate Division's interpretation of N.J.S.A. 14A:3-6(1) and Rule 4:32-5 of the Rules Governing the Courts of the State of New Jersey was totally divorced from the issue of Petitioner's right to pursue an independent cause of action under the ICA. All that was decided was that he could not raise the purported violation of the ICA (or any other matter) to defeat the settlement.

Petitioner contends that state law should not have governed his standing to press his ICA objection to the settlement.

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*For these same reasons, if Robin Acquisition had purchased Uniroyal, it would have fallen within the same exception.

**Moreover, CDU Holding is (and Robin Acquisition would have been) entitled to the exemption provided by Section 3(b)(1) of the Act, which excludes from the coverage of the Act companies that are engaged, directly or indirectly, in businesses other than investing and trading in securities. *See Orzeck v. Englehart*, 195 A.2d 375, 378-79 (Del. 1963).

But even if Petitioner were correct, and a federal procedural rule were appropriate to determine whether the ICA-based objection could be heard, that rule would also have barred the objection. Rule 23.1 of the Federal Rules of Civil Procedure imposes the identical contemporaneous ownership requirement for commencing and, by judicial interpretation, objecting to the settlement of derivative lawsuits. The Appellate Division itself discussed at length the applicability of the contemporaneous ownership requirement of Rule 23.1 in assessing an objector's standing to challenge the settlement of a derivative action. 35a-38a.

Thus, there is no conflict between the state law rule that was applied to bar Petitioner's objections and the federal rule that he implicitly seeks to have applied. Accordingly, there was no violation of the Supremacy Clause, and there is no reason to invoke this Court's jurisdiction.

3. The Equal Protection Claim Is Improper Because It Was Not Raised In The Highest Court Below And Thus Is Not Reviewable On Petition For Certiorari.

Petitioner's claim that he was denied equal protection of the laws because the Appellate Division adjudicated his lack of standing but did not consider the plaintiff's standing to sue derivatively is equally inappropriate for review by this Court.

It is essential to the Supreme Court's exercise of jurisdiction under 28 U.S.C. § 1257(3) that a substantial federal question have been properly raised in the state court proceedings. *Cardinale v. Louisiana*, 394 U.S. 437 (1969). Failure to follow the appellate channels provided by the state should be fatal to the chances of Supreme Court review, and the litigant should be deemed to have waived the federal issue, thereby removing any basis for the assertion of Supreme Court jurisdiction. *See, e.g., Herndon v. Georgia*, 295 U.S. 441 (1935); *John v. Paullin*, 231 U.S. 583 (1913).

Petitioner failed to articulate an equal protection challenge to the Appellate Division's decision in his petition to the New Jersey Supreme Court. Although Petitioner listed as an "error complained of" that "[t]he Appellate Division has focussed [sic] its attention on Petitioner's standing to object and has ignored

Pogostin's lack of standing to bring suit in New Jersey" (Ra6), he did not allege any constitutional claim based on that purported error of law. Petitioner cannot deliberately refuse to raise a federal constitutional claim in an appellate proceeding before the state's highest court and then attempt to pursue the claim for the first time before the United States Supreme Court, presumably in an effort to create a federal question. His argument has not been preserved and should not be considered by this Court.

4. **The Record Does Not Support The Equal Protection Claim.**

Even if the Court were to find that Petitioner had adequately preserved his equal protection claim, Petitioner would not, as a substantive matter, be entitled to relief under the circumstances of this case. Although Petitioner claims that the lower courts unfairly refused to assess Mr. Pogostin's standing to bring this lawsuit, Petitioner in fact has badly misrepresented the record on this issue.

Petitioner asserted his challenge to Mr. Pogostin's standing in the trial court, the Appellate Division and the New Jersey Supreme Court. Respondents refuted his claim at every stage in the proceedings. Indeed, Mr. Pogostin submitted an affidavit to the trial court stating that he owned Uniroyal Preferred Stock as of November 1978, (Ra18) and thus satisfied the contemporaneous ownership rule that served to defeat Petitioner's standing. The trial court (5a) and the Appellate Division (52a) considered all of Petitioner's arguments with respect to Pogostin's standing and found them to be without merit. Simply because the courts properly rejected Petitioner's challenges to Mr. Pogostin's standing and properly dismissed Petitioner's objections for lack of standing does not amount to a denial of Petitioner's rights under the equal protection clause.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Court should deny a writ of certiorari to review the judgment of the Appellate Division of the Superior Court of New Jersey.

Respectfully submitted,

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ELIZABETH J. SHER

Dated: November 3, 1987

CONTENTS OF APPENDIX

Statement of Corporate Affiliation Ra2

Petition for Certification to the New Jersey Supreme Court, April 30, 1987 (excerpt) Ra4

Leighton's November 6, 1985 letter of objections to settlement Ra7

Leighton's November 7, 1985 supplemental letter of objections to settlement Ra15

Affidavit of Bernard Pogostin dated November 12, 1985 in Support of Settlement and In Opposition to Objections Made by William Leighton Ra18

STATEMENT OF CORPORATE AFFILIATION

Respondent Uniroyal, Inc.'s parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each such corporation are, or arguably could be considered to be, the following:

Borg-Warner Industrial Products, B.V.
Borg-Warner Industrial Products GmbH
Borg-Warner Industrial Products, Inc.
Borg-Warner Industrial Products Ltd. (Canada)
Borg-Warner Industrial Products Ltd. (United Kingdom)
Borg-Warner Industrial Products, S.A. (Spain)
Borg-Warner Industrial Products, S.A. (Switzerland)
Borg-Warner Industrial Products, S.A.R.L.
Borg-Warner Industrial Products, S.r.1.
Borg-Warner Mechanical Seals (S.E.A.) Pte. Ltd.
BWIP Holding, Inc.
Byron Jackson Argentina, I.C.S.A.
Byron Jackson Co., S.A. Byron Jackson K.K.
C.B. Tool Distributors, Inc.
CDS Holding Corp.
CDU Holding, Inc. (a dissolved corporation)
CDU Holding, Inc. Liquidating Trust
Clayton & Dubilier, Inc.
Clayton & Dubilier Associates Limited Partnership
Clayton & Dubilier Private Equity Limited Partnership
Crane Distributing Co., Inc.
Ebara-Byron Jackson Co., Ltd.
Ibrahim Abunayyan-Byron Jackson Service Co., Ltd.
Imprimis A.G.
Interfas, S.A.
Interfas Holding, S.A.
Keel Manufacturing Co., Inc.
Nevamar Corporation
N-K Interface Ltd.
N-K International Ltd.

N-K International Holding Ltd.
Nu-Kote Canada, Inc.
Nu-Kote Canada Holding, Inc.
Nu-Kote de Columbia, S.A.
Nu-Kote Holding, Inc.
Nu-Kote International, Inc.
Nu-Kote Latin America, Inc.
The O. M. Scott & Sons Company
Office Media Co., Ltd.
Pilliod of Alabama, Inc.
The Pilliod Cabinet Company
Pilliod of Carolina, Inc.
Pilliod Export Corporation
Pilliod Holding Company
Pilliod of Mississippi, Inc.
Pilliod of Ohio, Inc.
Plunkett Distributors, Inc.
Specialty Building Products, Inc.
S. R. Engineering, Inc.
Tambour Industries, Inc.
Tex-Mar Distributors, Inc.
Uniroyal Distributing Branches, Inc.
The Uniroyal Goodrich Tire Company
Uniroyal Holding, Inc.
Uniroyal International, S.A.
Uniroyal Tire Company, Inc.
The Weimer Organization, Inc.
West-Mar Distributors, Inc.
695771 Ontario Inc. (Canada)

SUPREME COURT OF NEW JERSEY

BERNARD POGOSTIN, *Plaintiff-Respondent,* *-vs.-* UNIROYAL, INC., *et al.*, *Defendants-Respondents,* and WILLIAM LEIGHTON, *Objection-Petitioner-Movant,*	No. 26,965

PETITION FOR CERTIFICATION

to review the final judgment of the Appellate Division, Part D, entered on January 29, 1987

WILLIAM LEIGHTON
Petitioner-Objector-appellant
249 West 11th Street
New York, N.Y. 10014
(212) 255-0001

New York, NY
April 30, 1987

Questions Presented

1. Whether Article VI of the Constitution of the United States required the Appellate Division judges to apply Section 7(a) of the Investment Company Act of 1940, 15 U.S.C. Sec. 80a-7(a), to the consummation of a transaction, the Uniroyal-CDU merger, that is violative of that statute.

2. Whether this Court should consider defendants-appellees' brief and appendix filed below under the supervision of Ilan K. Reich, the Wachtell-Lipton partner who had conceived the Uniroyal-CDU merger and who is now serving a prison sentence for securities fraud.

3. Whether the judgment approving the settlement of this action should be vacated and a receiver appointed for Uniroyal since the defendants are carrying out the merger planned by Ilan K. Reich.

ERRORS COMPLAINED OF

* * *

9. The liquidation and dissolution, for speculative purposes, of a 95-year old New Jersey corporation with assets over one billion dollars, should have been given close scrutiny by the courts below. The settlement is a device to prevent such scrutiny by the courts, State and Federal, since the injunction contained in the final judgment bars the assertion of any claims arising out of the merger transactions.

10. The Appellate Division has/focussed its attention on petitioner's standing to object and has ignored Pogostin's lack of standing to bring suit in New Jersey.

As a nonresident, Pogostin should have been required to post security for costs on his derivative claim just as he had been required, in 1982, to post $75,000 security in a derivative suit involving the Grumman Corporation.

Had there been a genuine controversy between Pogostin and Uniroyal, the latter would have invoked the business judgment rule as a bar to Pogostin's derivative claims.

Respectfully submitted:

/s/

William Leighton
Petitioner, objector-appellant
below
249 West 11th Street
New York, N.Y. 10014
(212) 255-0001

New York, N.Y.
April 30, 1987

William Leighton
249 West 11th Street
New York, N.Y. 10014
(212) 255-0001

November 6, 1985

Clerk
Superior Court of New Jersey
Chancery Division: Bergen County
Bergen County Courthouse
Hackensack, N.J. 07602

Re: Civil Action No. C 4115-85E
Pogostin v. Uniroyal

Dear Sir:

I refer to the Notice of Pendency of Class Action and Proposed Settlement and Notice of the Proposed Dismissal and Compromise of Derivative Claims dated October 11, 1985 and signed by the Hon. Sherwin D. Lester, J.S.C. as published in the Wall Street Journal. The Notice states:

> Any person who objects to the Settlement Stipulation, the settlement and compromise, the judgment to be entered herein, or the award of attorneys' fees and expenses to plaintiff's counsel, *or who otherwise wishes to be heard,* may appear in person or by his attorney at the Hearing and present any evidence or argument that may be proper and relevant.

I am such a person and hereby give notice of intention to appear on the grounds and for the reasons that follow but not by way of limitation:

1. **No jurisdiction.**

Article III, Section 2 of the Constitution of the United States vests in Federal district courts jurisdiction over Cases or Controversies between citizens of different States. Here, defendant Uniroyal is a New Jersey corporation. The individual defendants seem to be citizens of the several States. The plaintiff's citizenship is not stated. Several nonparties to the action (the CDU entities) are parties to the stipulation of settlement but not defendants.

If there is complete diversity between the parties, this Court would not have jurisdiction over the subject matter of the action and Pogostin's complaint should be dismissed with prejudice as to him.

2. **No Case or Controversy.**

Whether arising under the Constitution of the United States or that of New Jersey, the basic elements of a Case or Controversy are these:

(i) that there be a claim as to which relief can be granted;

(ii) that there be jurisdiction over the subject matter and the parties;

(iii) that the class representative, being a fiduciary, fairly and adequately represent the class with diligence, wisdom and integrity, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, at 549-550 (1949).

If this were a New York State case, Pogostin would also have to show his commitment of financial and other resources in order to insure that the adequacy of representation prerequisite is met, *Stern v. Carter*, 82 A.D. 2d 321, 340, *Tanzer v. Turbodyne Corp.*, 68 A.D. 2d 614, 620.

None of these elements are present here. First, Uniroyal has failed to move for the dismissal of the action on the three grounds set forth above. Such a motion would have been neither burdensome, nor expensive, nor inconvenient nor distractive. Decision by the Court on such a motion would have identified the precise Controversy before the Court and laid the basis for jurisdiction.[1] Without such a definition, it is impossible for the Court to rule now whether the proposed settlement is fair, reasonable and adequate. As will appear more clearly from this submission, the "story" is quite different from that described in the Notice.

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[1] The parties have broadened the scope of this action by agreeing, on September 9, 1985, to the filing of Pogostin's amended complaint. The collusive agreement shows that there is no real Controversy between them and that the amendment was filed in order to widen the base of Pogostin's releases to the defendants.

Essentially what there is before the Court is a private contract between opposing law firms stipulating to a certain course of conduct in the future. Such a contract does not need the intervention of the Court unless the parties violate it, cf. *S.E.C.* v. *Randolph et al.*, 564 F. Supp. 137 (N.D. Ca., 1983). This proposed settlement will afford the Court an opportunity to rule whether the *Randolph* decision applies in the circumstances of this case.

3. **Real party in interest—the plaintiff.**

Nothing is said in the Notice about the plaintiff Bernard Pogostin. No *voir dire* has been conducted by the defendants in order to determine his capacity to sue as the real party in interest. Cf. F.R.Civ. P. 17(a).

It does not appear from the Notice *when and how* Pogostin has acquired his First Preferred shares of Uniroyal. Thus, the inference is permissible that upon the commencement of Icahn's tender offer of April 15, 1985, Pogostin acquired the shares which Icahn did not then offer to buy. A third party could have suggested such acquisition to Pogostin in order to create the class which Pogostin now seeks to represent. *Voir dire* conducted by the Court could elicit the facts with respect to Pogostin's acquisition.

Pogostin's position is particularly suspect because, suing derivatively, he does not seek the payment by the individual defendants to Uniroyal of the $5,900,000 paid to the Icahn Entities by Uniroyal (so-called "greenmail"). Nothing is said in the Stipulation of Settlement about this item. Yet the Releases (Exhibit 3) which Uniroyal is to deliver to the individual defendants and to the CDU nonparties seem to include this $5,900,000 item and to preclude litigation by others.[2] The payment itself is highly suspect.

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[2] In the amended complaint, Pogostin claims that he represents *all* holders of First Preferred shares. He does not.

4. **Real party in interest—the defendants.**

Clayton & Dubilier, Inc., Clayton & Dubilier Private Equity Fund Limited Partnership, CDU Holding, Inc. CDU Acquisition, Inc. and their subsidiaries (collectively "CDU") are not parties named in the caption of the action or in the proposed order and final judgment.[3] Nevertheless, they are to receive releases from Uniroyal, see Exhibit 3 to the Notice. Since they are not parties to this action, the CDU entities are not subject to the jurisdiction of this Court, thus clause 7 of the proposed order and final judgment will be inoperative as to CDU for want of personal jurisdiction.

5. **The issue under the Federal Investment Company Act of 1940 as to CDU**

Section 7(a) of the Act, 15 U.S.C. Sec. 80a-7(a) states, in pertinent part:

> No investment company organized or otherwise created under the laws of the United States or of a State and having a board of directors, unless registered under section 8, shall directly or indirectly—
>
> (2) purchase, redeem, retire, or otherwise acquire or attempt to acquire, by use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security, whether the issuer of such security is such investment company or another person;
>
> (3) control any investment company which does any of the acts enumerated in paragraphs (1) and (2);
>
> (4) engage in any business in interstate commerce; or
>
> (5) control any company which is engaged in any business in interstate commerce.

Section 3(a)(3) of the Act, 15 U.S.C. Sec. 80a-3(a)(3) states, in pertinent part:

> When used in this title "investment company" means any issuer which—
> is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such

[3] See Exhibit 'A', pp. 81-83 thereof for Uniroyal's description of CDU.

> issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis. ***

CDU and its affiliates is a holding company that squarely fits into the definition of Section 3(a)(3). There is no claim that CDU has registered pursuant to Section 8 of the Act prior to the Merger Agreement.[4] Thus CDU is in apparent violation of Section 7 and, if so, has come before this Court of Equity with unclean hands, *Gaudiosi v. Mellon*, 269 F. 2d 873, 881 (C.A. 3, 1959), cert. denied, 361 U.S. 902 (1959). It could very well be that Pogostin's failure to add the CDU entities as parties is due to his attorneys' knowledge that CDU is in violation of Section 7.

CDU and its affiliates should be denied any equitable relief by this Court, such as the releases which they seek from Uniroyal (Exhibit 3 to the Stipulation of Settlement). Under Section 44 of the Act, 15 U.S.C. Sec. 80a-43, this Court has an obligation to enforce Section 7 and not to condone its violation by a nonparty such as CDU. Section 44 states, in pertinent part:

> The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, *concurrently with State and Territorial courts*, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. * * *

Section 49 of the Act makes it a "white collar" crime to willfully violate *any provision* of the Act, such as Section 7. But CDU does not stop there. CDU, by this proposed settlement, is to have life-and-death powers over the First Preferred Uniroyal shares without the consent of the holders of the latter (pp.6, 50 of Uniroyal's proxy statement of August 28, 1985).[5] It would be indeed a travesty of justice if one engaged in a "white collar" crime would be given such powers over shares traded on the New

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[4] No such claim has been made by Uniroyal. See Exhibit 'A'. CDU is a party to the stipulation of settlement.

[5] Exhibit 'A'.

York Stock Exchange where the First Preferred is actively traded at the present time.

6. **The issue under the 1940 Act as to the Icahn Entities**

Under the heading "Background and Description of the Action" an amazing story unfolds concerning the Icahn offer. Basically, Icahn created Robin Acquisition Corporation ("Robin") for the purpose of acquiring Uniroyal common at $18 per share in debt securities of undetermined value. The Icahn offer thus scared the individual defendants into creating CDU and paying $22 per share in cash for Uniroyal common, including Icahn's.

No claim has been made by Icahn that Robin had registered under Section 8 of the Act prior to commencing its tender offer. Icahn is an old hand at violating Section 7. On November 3, 1983 Icahn consented to a final order enjoining another of his holding companies[6], Bayswater Realty & Capital Corp. from engaging in business while an investment company which had not registered with the S.E.C. pursuant to Section 7(a). In response he devised a scheme to circumvent that order by creating new investment companies, such as Robin, that are not subject to that injunction.

The burden of ascertaining Robin's status under the Act was clearly on the individual defendants before they were stampeded into paying Icahn $5,900,000. Evidently, if Robin was in violation of Section 7(a), equity would have enjoined the Icahn scheme, including NatWest's credit of $150,000,000 to Icahn. But the individual defendants do not claim that they have sought such relief. Therefore, they should not be heard by this Court at this time and given releases from such obvious breaches of fiduciary duties to Uniroyal. And Pogostin's derivative claims are inadequately prosecuted since he is seeking to release the individual defendants from their liability to Uniroyal without adequate consideration for the $5,900,000 paid by Uniroyal to Icahn.

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[6] Exhibit 'B', at B-2.

7. **Appointment of a Receiver for Uniroyal**

If Uniroyal has been merged into CDU in violation of Section 7 of the Act, the issue then arises what the Court should do in order to carry out its responsibilities under Section 44. The issue under Section 7 is complex in light of transactions that have been consummated. Undoing what has been done will have to be tested under the standards of Section 47(b) of the 1940 Act, 15 U.S.C. Sec. 80a-46(b), 94 Stat. 2277.

Subsection (b)(3) contemplates "recovery against any person for unjust enrichment", i.e. the $5,900,000 paid by Uniroyal to Icahn. Thus the only way that the Court may enforce Sections 7 and 47(b) of the Act is to appoint a receiver for Uniroyal to carry out the Court's orders and seek redress against the defendants. This is due to Pogostin's failure to adequately prosecute Uniroyal's rights of action against Icahn.

8. **The position of Uniroyal First Preferred Shareholders**

There are two subclasses of First Preferred shareholders: the subclass allegedly represented by Pogostin and the subclass of all persons, such as the undersigned, who have acquired First Preferred shares on the open market since May 6, 1985. Both subclasses were stayed and enjoined by Order of this Court, dated October 11, 1985, from "instituting, maintaining or prosecuting any and all actions, suits, claims, arbitrations or any other proceedings arising out of or relating to the subject matter of any of the pleadings in the *Pogostin* action or the terms of the Settlement Stipulation".

Because of that stay and injunction, no individual action against Uniroyal and CDU is possible at this time. Therefore, the Court should hear the objections of the subclass members whose fate will be sealed by the settlement if approved by the Court. Indeed, the Court should declare the rights of the subclass in view of the fact that CDU will have life-and-death power over the First Preferred shares. For example, as a result of the merger, Moody's Investors Service, Inc. has lowered the rating on Uniroyal's senior debt from Ba-2 to single B-2 and on the subordinated debt to single B-3 from single B-1. This will severely affect Uniroyal's ability to borrow in the future and

adversely affect its earnings, thus placing in jeopardy the $8.00 annual dividend on the First Preferred.

9. **Conclusion**

The proposed settlement should be rejected and a receiver should be appointed for Uniroyal to carry out the orders of the Court in accordance with the mandates of the Investment Company Act of 1940.

Respectfully submitted,

/s/

William Leighton
A beneficial holder of
First Preferred shares
of Uniroyal, Inc.
249 West 11th Street
New York, N.Y. 10014
(212) 255-0001

cc: Allan H. Klinger, Esq. Clyde A. Szuch, Esq.
John H. Hall, Esq. (copies mailed November 6, 1985)

William Leighton
249 West 11th Street
New York, N.Y. 10014
(212) 255-0001

November 7, 1985

Clerk
Superior Court of New Jersey
Chancery Division: Bergen County
Bergen County Courthouse
Hackensack, N.J. 07602

Re: Civil Action No. C 4115-85E
Pogostin v. Uniroyal

Dear Sir:

Herewith Supplemental Objections to the settlement of the above action. The Original Objections were mailed to you for filing on November 6. For clarity, the numbering of these Supplemental Objections follows the numbering of the Original Objections.

10. **Pogostin's action should be dismissed for failure to join indispensable parties**

One of the cardinal rules of civil procedure is that an action cannot be maintained in the absence of indispensable parties, see F.R.Civ.P. 12(b)(7), New York CPLR 3211(a)(10).

Some of the defendants named in the caption of Pogostin's action are directors of CDU Acquisition, Inc. (Acquiring), a New Jersey corporation that was organized in 1985, Exhibit 'A' at A-2. Defendants Flannery, Barzelay, Beretta, Wentz and York are directors of Acquiring.

Some of the defendants named in the caption of Pogostin's actions are directors of CDU Holding, Inc. (Holding). Holding was organized in 1985 as a Delaware corporation, Exhibit 'A' at A-3. Defendant Flannery is a member of Holding's board. "Four other qualified independent directors" (presumably of Uniroyal) recommended by Mr. Flannery are also Holding directors. These persons could be among the defendants in the Pogostin action.

The C & D Fund is a Connecticut limited partnership organized in 1983 as an investment partnership. C & D acts as manager of the C & D Fund. The general partner of the C & D Fund is Clayton & Dubilier Associates Limited Partnership (C&D Ltd), a Connecticut limited partnership organized for that purpose in 1983. The executive offices of the C&D Fund and of C&D Ltd. are at 270 Greenwich Avenue, Greenwich, Connecticut 06830. Each of C&D, Acquiring and Holding has its executive offices at 126 East 56th Street, New York, N.Y. 10022, see Exhibit 'A' at A-2 and A-3. C&D, a Delaware corporation, is a private investment firm which specializes in leveraged buy-outs involving management participation.

With the exception of Holding, none of these entities are represented by counsel in the Pogostin action. John H. Hall, Esq., a New York attorney, has signed the stipulation of settlement on behalf of CDU Holding, Inc. only.

Thus, Uniroyal is to release from liability its own directors, one nonparty represented by counsel (Holding) and three nonparties not represented by counsel (C&D Private Equity Fund Limited Partnership, C&D and CDU Acquisition, Inc.). As an issue of first impression, the proposed settlement will present the Court with the question of whether named defendants can release themselves from liability incurred by them as directors of absent parties. Obviously, the Court cannot declare the rights, duties and obligations of absent parties, for which reason Pogostin's action should be dismissed for failure to join as indispensable parties C&D, CDU Acquisition, Inc., CDU Holding, Inc. and the Clayton & Dubilier Associates Limited Partnership, managing the C&D Fund.

11. Conflicts of Interest must be disclosed in any communication that is *mailed* for the purpose of inducing the recipient to part with something of value, *U.S.A. v. Bronston*, 658 F. 2d 920 (C.A. 2, 1981), *cert. denied*, 456 U.S. 915 (1982).

The October 11, 1985 Notice to "All persons who are current beneficial owners of First Preferred stock of Uniroyal Inc." and to the class allegedly represented by Pogostin, does not disclose the conflicts of interest that are inherent in the position of the defendants Flannery, Barzelay, Beretta, Wentz and York as

chairman and members, respectively, of the board of Uniroyal and as members of the boards of Holding and Acquiring. In the August 28, 1985 proxy statement, these defendants have conceded such conflicts of interest, see Exhibit 'C', attached.

The Notice was published in the Wall Street Journal, which is also being mailed to subscribers and which is distributed in interstate commerce. The Notice was also forwarded, presumably by mail, to beneficial owners of First Preferred. In addition, the conflict of interest opposing CDU, Holding and its directors and the First Preferred shareholders is obvious: in order to maintain their common stock position, Holding and its directors will have to retire at least $750,000,000 in Uniroyal debt by December 31, 1987. See Exhibit 'A' at A-3. This can be accomplished only if Uniroyal assets are transferred to subsidiaries and sold or mortgaged without the consent of First Preferred shareholders.

The October 11, 1985 Notice is defective for failure to disclose these conflicts of interest. The Court should take this into account when considering the number of protests against the settlement.

Respectfully submitted:

/s/

William Leighton
A beneficial holder of
First Preferred shares of
Uniroyal, Inc.
249 West 11th Street
New York, N.Y. 10014
(212) 255-0001

cc: Allan H. Klinger, Esq.
Clyde A. Szuch, Esq.
John H. Hall, Esq. (copies mailed November 7, 1985)

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Attorneys for Plaintiff

SUPERIOR COURT OF NEW JERSEY
Chancery Division: Bergen County
DOCKET NO. C4115-85E

BERNARD POGOSTIN,	:	AFFIDAVIT IN SUPPORT OF SETTLEMENT AND IN OPPOSITION TO OBJECTIONS MADE BY WILLIAM LEIGHTON
Plaintiff,	:	
– against –	:	
UNIROYAL, INC.;,	:	
Defendant.	:	

STATE OF NEW YORK)
: ss:
COUNTY OF YORK)

BERNARD POGOSTIN, being duly sworn deposes and says:

I am the plaintiff in the above-entitled action and submit this affidavit in support of the proposed settlement and in answer to the objections filed by William Leighton ("Leighton").

Leighton states that it is a permissable inference that I purchased Uniroyal First Preferred on or after April 15, 1985, the date Carl Icahn ("Icahn") announced an $18 dollar tender offer for the common stock of Uniroyal. Leighton hypothesizes that such purchase would have been made with knowledge of the adverse consequences to the First Preferred and thus, may have been designed not as an investment, but as a means to enable me to bring a law suit on behalf of a "third party." Mr. Leighton's speculation is totally unfounded. I purchased First Preferred in November 1978, seven years ago, and have held such shares continuously since then.

Leighton, however, states that he purchased Uniroyal First Preferred after May 6, 1985, when the terms of the agreement with Icahn were announced. In that very month, the First Preferred traded at $50 per share and did not recover until the settlement was disclosed. On Friday, November 8, 1985, the First Preferred closed at $73 per share. Thus, Leighton has received a "windfall" benefit as a result of this settlement. I am, therefore, at a loss to understand his reason for opposing a settlement which confers a substantial benefit on him.

Leighton also asserts that the settlement will preclude a lawsuit against Icahn for "greenmail." There are two separate and complete answers to this charge. First, the settlement does not provide for a release to Icahn or his corporate affiliates. Thus, any shareholder who has standing can maintain an action against Icahn.* Second, Icahn does not appear to have engaged in "greenmail". Icahn's group owned over 3 million shares of Uniroyal common stock at the time of the leveraged buyout. Icahn received the very same price, i.e. $22 per share, as did every other Uniroyal common stockholder. The classic "greenmailer" exacts a premium for his shares alone.** While the reimbursement of expenses paid to Icahn, $5.9 million, seems high, it compares favorably with the expenses incurred by Uniroyal. Further as noted in a Wall Street Journal article that appeared on November 8, 1985,*** expenses incurred in merger and acquisition transactions are *sui generis* and reflect what the traffic will bear. In the aforesaid article, it is noted that the expenses in the Revlon takeover battle, a $1.8 billion acquisition, will approximate $100 million dollars. In the instant case, the acquisition of Uniroyal approximated $1 billion and the overall expenses approximated $44 million.

Leighton, who I am informed is not listed as a member of the Bar of New York or New Jersey, raises several legal issues concerning jurisdiction. My attorneys have advised me that

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*I have been informed by my counsel that in order to have "standing" a shareholder must have acquired his stock prior to the time of the wrong. The agreement with Icahn was made on May 6, 1985. Since Leighton acquired First Preferred after May 6, 1985, he lacks standing.

**A review of the leading greenmail activities is summarized in Exhibit "A".

***A copy of the aforesaid Wall Street Journal article is annexed hereto and marked Exhibit "B".

Leighton's contentions are so frivolous as to reflect poorly upon his good faith. My attorneys, however, are submitting a brief which answers Leighton's objections.

WHEREFORE, your deponent respectfully requests that the settlement be approved.

/s/
BERNARD POGOSTIN

Sworn to before me this
12th day of November, 1985

/s/
Notary Public